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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO RIOS,

Defendant and Appellant.

D052180

(Super. Ct. No. SCN222228)

APPEAL from a judgment of the Superior Court of San Diego County, David Rubin, Judge. Affirmed.

A jury convicted Fernando Rios of assault by means likely to produce great bodily injury. (Pen. Code,<sup>1</sup> § 245, subd. (a)(1).) The jury found that in the commission and attempted commission of the assault, Rios personally inflicted great bodily injury upon Lee. (§ 12022.7, subd. (a).) The jury acquitted Rios of battery with serious bodily injury (§ 243, subd. (d)), but convicted him of the lesser included offense of battery. (§ 242.)

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

The trial court denied Rios's request to reduce the felony conviction of assault by means likely to produce great bodily injury to a misdemeanor. (§ 17, subd. (b).)

Rios appeals, contending that the trial court abused its discretion because his trial conduct,<sup>2</sup> his future prospects, and his character traits are mitigating factors that justify reducing the felony conviction to a misdemeanor. We affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

On the evening of June 16, 2006, Jessie Swihart, Dustin Lee, and a group of friends visited the La Jolla Indian Campground. After the campers set up their site and drank a few beers, two security guards, Brian Beresford and Fernando Rios, informed them that another party had reserved the site for the night and they would have to move to an unreserved location. Although the campers quarreled with the guards about relocating to a new area, they eventually broke down the campsite and moved.

Swihart and Lee continued to drink alcohol at the new campsite and decided to "roam around" and visit other campers. They met Jamie Pearson and Jacob Brown at a site near the entrance to the campground. Beresford and Rios eventually arrived and ordered Swihart and Lee back to their campsite. Swihart and Lee asked Beresford and Rios why they were following them and giving them a hard time.

Without explaining why, Rios instructed Beresford to handcuff Swihart. Rios grabbed Lee and slammed him onto the ground, where Lee landed on his face. Beresford

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<sup>2</sup> Although Rios states that the trial court abused its discretion due to his trial conduct, he does not explain how this is relevant on appeal, nor have we found any conduct that warrants discussion.

held Swihart, who watched as Rios repeatedly punched Lee in the head and back while Lee's face was on the ground. Rios then handcuffed Lee and took him to a security vehicle, at which point Rios continued to hit Lee.

A third security guard arrived. After speaking with Swihart, the guard struck him in the face, causing Swihart to fall to the ground. Then, either Rios or the third security guard hit Lee in the face, knocking him unconscious. Beresford threw Swihart onto the hood of the vehicle before releasing Swihart from the handcuffs.

The guards put Lee into the security vehicle and ordered Swihart to follow them in his truck to the entrance of the campground. At the entrance, the guards challenged Swihart to a fight. Swihart refused. The guards released Lee from the handcuffs and told them to leave the campground immediately. The guards did not allow them to gather their belongings from the campsite, nor did they offer any medical assistance. After examining Lee's bloody face and disoriented condition, Swihart drove Lee to a hospital.

Lee sustained several fractures from the incident, including the bone from his left ear to the left eye, the bone just below the left eye, which was fractured in multiple places, and the nasal bone near his left eye.

## DISCUSSION

The trial court has the discretion under section 17, subdivision (b) to reduce a "wobbler" offense from a felony to a misdemeanor. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974.) In order to properly exercise its discretion, the trial court may consider such factors as " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as

evidenced by his behavior and demeanor at the trial.' " (*Id.* at p. 978, quoting *People v. Morales* (1967) 252 Cal.App.2d 537, 547.) Other relevant factors include the general sentencing objectives found in rule 4.410 of the California Rules of Court.<sup>3</sup> The court must focus on those considerations specific to the individual defendant. (Rule 4.410.)

On appeal, the burden is on the party attacking the trial court's decision to show that the sentence was arbitrary or capricious. The appellate court will not reverse the decision simply because reasonable minds might disagree on the outcome. (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at pp. 977-978.)

Here, the court found that Rios had a prior record consisting of a conviction for disorderly conduct (§ 647), a conviction of driving under the influence (Veh. Code, § 23152), and a conviction of willfully evading a police officer with a weapons charge. (Veh. Code, § 2800.1; § 12025.) Additionally, the court found Rios acted under color of authority and found his "abuse of authority" disturbing. Finally, the court refused to reduce the conviction to a misdemeanor due to the significance and severity of Lee's injuries.

Under these circumstances, we cannot say the trial court abused its broad discretion in rejecting Rios's request. We also note that rule 4.421 states that a particularly vulnerable victim is one circumstance relevant to aggravation in sentencing.

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<sup>3</sup> All rule references are to the California Rules of Court. Rule 4.410 outlines some of the general objectives in sentencing: "(1) Protecting society; [¶] (2) Punishing the defendant; [¶] (3) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses; [¶] (4) Deterring others from criminal conduct by demonstrating its consequences."

In addition to the reasons given by the trial court, Rios took advantage of Lee while Lee was in a particularly vulnerable state, beating him while he was handcuffed.

Further, although Rios asserts the court abused its discretion, he essentially argues the better application of facts in this case would be to reduce the felony conviction to a misdemeanor. Because this is not a de novo review, we will not exercise our independent judgment, which would give no deference to the trial court's ruling. Instead, we conclude the "trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) We have been provided no basis upon which to overturn the trial court's judgment.

#### DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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HALLER, J.

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O'ROURKE, J.